

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE EASTERN DISTRICT OF TEXAS  
3                   SHERMAN DIVISION

4                   THE STATE OF TEXAS, et al,

§

§

5                   Plaintiff,

§

§

6                   vs.

§                   Case No.:

7                   GOOGLE, LLC,

§                   4:20-cv-00957-SDJ

§

§

8                   Defendant.

§

§

9                   PRELIMINARY SCHEDULING CONFERENCE  
10                  TRANSCRIPT OF PROCEEDINGS  
11                  BEFORE THE HONORABLE SEAN D. JORDAN  
12                  UNITED STATES DISTRICT JUDGE

13                  Thursday, February 4, 2021; 10:16 a.m.  
14                  Plano, Texas

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1 February 4, 2021

10:16 a.m.

2 ---oo---

3 P R O C E E D I N G S

4 ---oo---

5 THE COURT: Good morning. Please be seated.

6 All right. We're here on cause number 4:20-cv-957,  
7 State of Texas, et al versus Google, LLC. And I want to get  
8 a few quick housekeeping matters out before I even have  
9 counsel do introductions.

10 So as I think everybody in this room is probably  
11 aware, we have a number of attorneys who are participating  
12 via video conference in this preliminary scheduling  
13 conference. We also have some attorneys who are here,  
14 obviously, in the courtroom. We also have a few attorneys I  
15 think who are in by video -- I'm sorry, by audio conference  
16 only. And also I wanted all of the attorneys to be aware  
17 that we also have an audio-only feed that is available to the  
18 public and the media for this hearing, and it is something  
19 that we'll plan to do for future hearings, too.

20 So one of the things we'll need to be considering,  
21 not necessarily today, is how we handle issues of  
22 confidentiality and issues that are otherwise under seal.  
23 But I want everybody to be aware that we do have an  
24 audio-feed only going to the public and the press today.

25 So we have, as you're also aware, a large number of

1       attorneys who, as I understand it, are on video conference  
2       and who may or may not want to say something. I will tell  
3       you that my preference is, number one, to have lead counsel  
4       as much as possible do all of the speaking, and lead counsel  
5       to go ahead and make the appearance introductions, as much as  
6       possible, for everyone on their side. I mean, to the extent  
7       that somebody needs to make an appearance separately, that's  
8       fine. But if lead counsel can just notify the Court of all  
9       the various attorneys who are appearing, I think we'll move a  
10      little more efficiently.

11                  For all of the attorneys who are here by video  
12       conference or by audio conference, please do keep yourself on  
13       mute unless you do happen to be speaking.

14                  And with that, I will go ahead and let counsel make  
15       their introductions. Let's -- we'll start with the State of  
16       Texas and their lead counsel to make introductions for Texas  
17       and all of the other sovereign States that are part of this  
18       case, and then we'll have Mr. Yetter make introductions for  
19       Google.

20                  MR. LANIER: Thank you, Your Honor. May it please  
21       the Court. My name is Mark Lanier. I'm lead counsel for the  
22       State of Texas. Here at counsel table with me is Zeke DeRose  
23       from my firm; he may argue one thing or another today, with  
24       your permission, depending upon what you get into today,  
25       because we're not totally sure. Shawn Cowles with the State

1 of Texas is here, is not going to be arguing. We've  
2 got Roger Alford here as well, State of Texas; he will not be  
3 arguing. Alex Brown from my firm will not be arguing. Grant  
4 Dorfman, State of Texas, will not be arguing. Ashley Keller,  
5 my co-lead counsel, will be arguing, with the Court's  
6 permission, depending upon what we get into.

7                   And final housekeeping note, Your Honor. We do  
8 understand that there are some states who are live on video  
9 right now but are unable to speak because of a system glitch.  
10 So with the Court's permission, what we're willing to do,  
11 recognizing the public has access to it, is give out poor  
12 Zeke's phone number so if any of the States have a question,  
13 they can either text the question to Zeke, or if they want to  
14 make an appearance and the Court deems it okay, we'll  
15 MacGyver his phone to a microphone or something.

16                  THE COURT: Well, Mr. Lanier, I believe my  
17 courtroom deputy is telling me that the glitch is fixed.

18                  Is that correct?

19                  THE COURTROOM DEPUTY: I'm being told by the IT  
20 that it's fixed. We might want to try it out with one  
21 participant, just to make sure they can un-mute themselves.

22                  THE COURT: Why don't we do that. Do you have  
23 somebody, Mr. Lanier, who you know would like to introduce  
24 themselves?

25                  MR. LANIER: Warren Postman is Mr. Keller's partner

1 from Chicago. So he's right there on the screen. We can see  
2 him easy. If he could un-mute and see if we hear him.

3 THE COURT: Go ahead, Mr. Postman.

4 (No audio from video conference.)

5 THE COURT: Well, I see him speaking. I don't hear  
6 anything. Do you have -- I'm assuming he's attempted to  
7 un-mute himself.

8 So why don't we do this, then. Whether the glitch  
9 is fixed or not, to be perfectly candid, I think it's going  
10 to make us move more efficiently if people are sending their  
11 questions to Mr. DeRose anyway. So, Mr. Lanier, if you want  
12 to go ahead and disclose that number.

13 MR. LANIER: I will, Your Honor, with some mixed  
14 joy.

15 THE COURT: It's not my phone.

16 MR. LANIER: Exactly. And he does DUI bails in the  
17 middle of the night, if anybody has any trouble.

18 [REDACTED] Thank you, Your Honor.

19 THE COURT: All right. And I have a list of, you  
20 know -- so the Court is aware, just so you know, I have a  
21 list of all of the various attorneys. I mean, I see people  
22 on the screen as well, but just -- but I can only see a  
23 certain number of people on the screen, and you can only see  
24 a certain number. There are a number of people who are also  
25 by video conference; we just don't see them.

1           I have a list and so I'm aware, I can tell you, of  
2 each person that is here by conference for all the States,  
3 Mr. Lanier. So I don't know that you want or need to go  
4 through the list of them. You can if you'd like.

5           MR. LANIER: Your Honor, I think if you've got it  
6 all under control, it's whatever -- you're the Judge. I'm  
7 just here. So I think we're great like this.

8           THE COURT: All right. Well, I appreciate it. And  
9 I appreciate the fact that the States have all got somebody  
10 on the line who is present for them, and I'm aware of who  
11 they are.

12           So, Mr. Yetter, would you like to introduce counsel  
13 for Google.

14           MR. YETTER: Yes. I would be happy to, Your Honor.  
15 May it please the Court. Paul Yetter from Yetter Coleman for  
16 the defendant, Google; and my cocounsel, Eric Mahr, from  
17 Freshfields, also for the defendant. Thank you, Your Honor.

18           THE COURT: All right. Thank you, Mr. Yetter. I  
19 know you have some cocounsel who are online by video, but  
20 again I'm aware of who they are.

21           MR. YETTER: Yes, they are. Thank you, Your Honor.

22           THE COURT: All right. So we're here, as I  
23 mentioned earlier, for just a preliminary scheduling  
24 conference. This was something that the plaintiffs had  
25 requested. And as you saw from the Court's order of

1       January 22, I thought it made sense to have a preliminary  
2 scheduling conference at this time, even though Google's  
3 deadline to answer or otherwise respond does not come until  
4 later this month.

5                  I have a few topics that I'd like to go through.  
6 I'm going to tell you what they are. I want to talk briefly  
7 about where we are on timeline and pending motions, that's  
8 topic one for me.

9                  Topic two for me is just going to be sort of a  
10 status update on how you're doing on a protective order, a  
11 proposed protective order.

12                  And then topic three for me is just going to be to  
13 address what I'm perceiving might be an issue in terms of how  
14 the parties are conferencing in this case, meaning for  
15 certificates of conference. And this mainly just has to do  
16 with making sure that we iron out how that's being done,  
17 understanding that Texas is -- has been acting as the lead  
18 state in this, and just to make sure that we're on the same  
19 page.

20                  Before we get into the timeline issues, typically I  
21 would give the parties in any case an opportunity, if they  
22 would like, to talk about the case a little bit. I recognize  
23 that in this case that is a -- that would be a fraught  
24 endeavor because I have read more than once the 116-page-plus  
25 complaint, and I have also reviewed the 1404(a) motion and

1       the response that was recently filed. So I will tell you  
2       that since I'm your audience today, I am familiar with the  
3       case at least as developed to date.

4                   So I don't want you to feel like -- and we're going  
5       to have more conferences. I don't want you to feel like you  
6       need to have a ten minute or -- you would probably feel like  
7       you need a lot more time than that to talk about the case.  
8       But if there is anything in particular that you would like to  
9       state about the case at this time before we get into the  
10      timeline, I'm happy to have you do that.

11                  And again we can start with Mr. Lanier for  
12      plaintiffs.

13                  MR. LANIER: Your Honor, recognizing what you  
14       already know, the only thing I can think to add that might be  
15       relevant, as we get into timeline, is the fact that the State  
16       of Texas has already been investigating this matter since  
17       September of 2019, and that there has been a large  
18       multi-state investigation associated with that. Other than  
19       that, you've got everything.

20                  THE COURT: And I figured that topic will come up  
21       as part of what we talk about a little bit with regard to  
22       timeline and order governing proceedings.

23                  Mr. Yetter.

24                  MR. YETTER: Your Honor, you're exactly right.  
25       Counsel was correct that the State has been investigating

1       this for -- at least the State of Texas has been  
2       investigating this for 18 months. There is still other -- an  
3       ongoing investigation --

4                     THE COURTROOM DEPUTY: Can you turn on your  
5       microphone?

6                     MR. YETTER: This is a new microphone for me, Your  
7       Honor.

8                     THE COURT: When the green light is on, you are  
9       good to go.

10                  MR. YETTER: Here we go.

11                  THE COURT: Yes.

12                  MR. YETTER: And, Your Honor, and this will come up  
13       in the timing. We are at -- Google is at -- the State has  
14       had a big head start and that's -- this will factor into the  
15       timing of the case.

16                  THE COURT: All right. Thank you, Mr. Yetter.

17                  MR. YETTER: Thank you.

18                  THE COURT: So let's go ahead and dive into talking  
19       a little bit about the timeline. So I'm going to tell you  
20       where I see the case is at, at this moment. We obviously,  
21       you know, had a complaint filed initially, it was a redacted  
22       complaint. After the Court's order of January 22, an  
23       unredacted complaint was submitted and was filed in this  
24       case, and was eventually served on Google.

25                  As I noted in that January 22 order, I know Google

1 had had the redacted complaint for about approximately a  
2 month, and Google's answer is now due later this month.

3                 My current plan is that after Google answers or  
4 otherwise responds in the case, the Court will issue our  
5 order governing proceedings and we will set a case management  
6 conference. You know, I will tell you that when we issue  
7 that, I think the parties may have adjustments that the Court  
8 would like to make on that schedule, both substantively in  
9 terms of issues relating to discovery, protective order, et  
10 cetera, and in terms of timelines.

11                 So I won't go into the timelines today, but just to  
12 say that I think the timelines in the Court's normal order  
13 governing proceedings may not work well for this case. But I  
14 will tell you the plan would be probably to get it out and,  
15 you know, we can amend it as needed. And if we even need to  
16 have a conference about that, we can do that, to figure out  
17 what works best leading up to the case management conference.

18                 Number two, I understand that we have Google's  
19 1404(a) motion pending which I referenced before. The States  
20 have just responded. I have no doubt that Google will be  
21 filing a reply. We may see a sur-reply. I wanted to note  
22 two things about that motion. The first is my general policy  
23 is, on motions, that we -- if I feel like I need oral  
24 argument, I'll let the parties know and we'll have an oral  
25 argument; otherwise, and I think particularly for this case,

1 if there is a request by either side for a hearing on a  
2 motion, we'll have a hearing. So I don't know if you're  
3 prepared to answer this at this moment, but I wanted to ask  
4 right now, is either side or both sides wanting a hearing on  
5 the 1404(a) motion?

6 MR. YETTER: Yes, Your Honor, we will want a  
7 hearing. And I think the timeline is Tuesday for our reply,  
8 Tuesday the 9th of February, and then the 16th is their  
9 sur-reply. So if the Court -- consistent with the Court's  
10 busy docket, if the Court has the end of February, early  
11 March, we would like a hearing.

12 THE COURT: Absolutely. So here is what I would  
13 recommend is that the parties get in touch with my judicial  
14 assistant, who I think you have been in contact with, Lori  
15 Munoz, and provide some dates in that time frame -- I think  
16 we're looking towards end of February, early March -- that  
17 would be available for you for a hearing.

18 And the second thing I'll note is that I don't have  
19 any plan to stay proceedings while the 1404(a) motion is  
20 pending. Instead, what I plan to do is to work on that  
21 motion efficiently and try and get it decided as quickly as  
22 we can.

23 So those were the issues, the only issues, I have  
24 with the 1404(a) motion at this time. And those at the  
25 moment are all my comments on our timeline, as we sit here

1 today. Is there anything else with regard to -- well, let me  
2 go ahead and step back for a second.

3 Because, Mr. Lanier, you raised a good point with  
4 regard to timeline and what that looks like in terms of  
5 discovery issues potentially, is what I think you're  
6 referencing, because we have investigations by Texas at least  
7 and potentially other states. I will tell you that I think  
8 that may well play into our analysis of the timeline when  
9 we're looking at the order governing proceedings and how we  
10 go from there in terms of the discovery timeline in this  
11 case.

12 And I think that would be expanded on both sides  
13 because, as Mr. Yetter has pointed out, that may, you know,  
14 mean the State has a lot of information. I understand the  
15 State would say a lot of that, you know, this information  
16 came from Google. Both sides will be able to make their  
17 arguments on that, and we'll look at it at that time.

18 So the second item -- well, let me say is there  
19 anything else on the timeline that either party thinks we  
20 need to visit at this time?

21 MR. LANIER: Not from plaintiff, Your Honor.

22 THE COURT: All right.

23 MR. YETTER: Your Honor, I will say perhaps it  
24 might help the Court if we -- we have started to talk about  
25 the timing, and one of the first issues that came up is

1 discovery. And I think, from our standpoint, we do feel like  
2 we're at a bit of a disadvantage. The State has -- as the  
3 States' response on the transfer motion says, apparently  
4 they've talked to 64 third parties and they've gotten  
5 millions of documents -- pages of documents. Some are, at  
6 least, of those we have not seen and we would need to see,  
7 and we have not talked to any of those third parties.

8           But it may help the Court to give some input before  
9 the Court sets that initial -- your initial -- sends out your  
10 initial order after we answer or respond on the 22nd of  
11 February, to get the parties -- to get -- for the parties to  
12 talk about what discovery they anticipate. We've talked a  
13 little bit preliminarily, and the State or the plaintiffs  
14 have indicated to us that they're going to have limited  
15 discovery. But the first discovery request -- and I don't  
16 mean to go on too much about this, Your Honor -- is extremely  
17 extensive that they have mentioned to us.

18           So it might make some sense for the parties to  
19 continue to talk, and give you some sense of what discovery  
20 to anticipate. From our perspective, Google, we have a lot  
21 of catching up to do. And it sounds like the State is going  
22 to be doing some fairly extensive discovery as well. So that  
23 might be something that you, the Court, would want to factor  
24 into that, your initial order on the scheduling.

25           THE COURT: All right. Thank you, Mr. Yetter.

1                   Mr. Lanier, do you have a comment?

2                   MR. LANIER: Please, Your Honor. I will represent  
3 to the Court on the record that we will move with all  
4 expediency to produce anything we need to produce, to get  
5 Google up to speed with documents that we may have gotten.

6                   What we've done as far as third-party  
7 investigation, I'm sure Google has -- Google's been aware  
8 we've been doing this for 18 months as well. And I'm sure  
9 they've done their own investigation. That's not necessarily  
10 all discoverable information. But I'd just represent to the  
11 Court that we'll move with all expediency, and you can hold  
12 me to it at every hearing from here on out. We will give  
13 them everything we can as quickly as possible.

14                  THE COURT: Well, I understand.

15                  And, Mr. Yetter, to your point, what the Court may  
16 do, after Google's gone ahead and responded or answered, is  
17 we may send out something to get a joint report from the  
18 parties in advance of the issuance of the OGP. So the point  
19 is well taken, and the Court may go ahead and do that, we'll  
20 do it on efficient timeline.

21                  And I would ask that the parties, as you've noted,  
22 Mr. Yetter, continue those conversations. So, in other  
23 words, looking forward, expect something like that to come  
24 from the Court. And then I'm not going to give you a long  
25 fuse to get it back to the Court because I do want to keep

1       this case moving.

2                    MR. YETTER: Thank you, Your Honor. I think that  
3 sounds like a very wise idea.

4                    THE COURT: All right. So let me move to the  
5 protective order. You know, the -- I noted in the order that  
6 was issued on January 22 that I was hopeful that you all  
7 could confer and put together a proposed protective order as  
8 soon as you could, understanding that that may not be the  
9 easiest document to put together.

10                  I did also want to highlight for the parties -- I  
11 did in the order and I wanted to highlight again today -- are  
12 the general order that we have in the district, 21-02 that  
13 was entered last month, and that is a direct result of,  
14 unfortunately, the SolarWinds hack and issues arising from  
15 that. I'm sure the parties have had a chance to look at that  
16 general order. And I would note that if you have reviewed  
17 that general order, then you will see that there is certainly  
18 the possibility that there may be materials in this case that  
19 might be subject to that order.

20                  But I would also note for the parties that the  
21 language in that order that says presumptively our sealing --  
22 our sealing process here is presumed to be adequate. But if  
23 the parties think otherwise as to particular materials, I  
24 wanted to highlight that because it's a rather involved  
25 process. And I will tell you that, as you would expect, it's

1       a new process for the Court. So please be cognizant of that  
2       when you're putting together the protective order. And I  
3       wanted to see if I could get an update from counsel as to how  
4       you're doing on that.

5                    MR. LANIER: With the Court's permission,  
6       Mr. DeRose would address the protective order; though, I'm  
7       glad to do it if the Court would prefer lead counsel to do  
8       it.

9                    THE COURT: No. That's fine.

10                  Mr. DeRose?

11                  MR. DEROSE: Thank you, Your Honor. I'm not --  
12       there we go. I got it working.

13                  Your Honor, we have been working with opposing  
14       counsel on a protective order for the past week or so. We  
15       have essentially accepted all of the terms of the protective  
16       order that Google has entered into with the DOJ and other  
17       states in the DOJ Search case. Google has added a couple of  
18       new additions that they would like to have involved, have  
19       included, in this case.

20                  We are very much aware of the general order from  
21       the Eastern District. And even recently this week, the DOJ  
22       acknowledged that they, too, were the victim of the  
23       SolarWinds hack at the end of last year. So our hope is to  
24       have I think a conference, and maybe even tomorrow or at our  
25       earliest on Monday, with Google on that.

1           There are a couple of issues that they wanted  
2 added. But we have amazing outside counsel, and so I'm sure  
3 we'll reach a reasonable decision, or at least mitigate it,  
4 so that we're very narrow on what we bring before Your Honor  
5 to safeguard the confidentiality of our consulting experts  
6 and trial consultants, but also put in a mechanism to  
7 safeguard Google's and third parties' confidential  
8 information, and then a remedy for redress if need be. But  
9 I'm optimistic, Your Honor.

10           THE COURT: All right. Thank you, Mr. DeRose.

11           Mr. Yetter?

12           MR. YETTER: Just briefly, Your Honor. What  
13 counsel said was exactly right. We're much farther than you  
14 might have expected, Your Honor, because protective orders  
15 can last -- you know, negotiations can go on forever. But  
16 the negotiations were done in the Search case in DC between  
17 Google and the DOJ and Texas which is in that case as well.  
18 It was protracted. They got it all worked out.

19           And we have -- both sides have agreed that those  
20 basic terms make sense here with two exceptions. The  
21 Court -- the new Eastern District rules about highly  
22 sensitive information is something that, to be very frank, I  
23 haven't fully digested and I don't think, at least in our  
24 discussions, we were not clear quite how to deal with those.  
25 So for the moment, I think we set those aside and we -- but

1       we need to focus on that and we can do that relatively  
2       quickly.

3                  There were -- secondly, there were some additions  
4       that we proposed to the existing protective order for some  
5       very specific reasons. And as the Court may or may not know,  
6       right after this case in Texas was filed, a portion of the  
7       unredacted complaint was provided to the *New York Times* and  
8       to the *Wall Street Journal*. We have no idea -- we, Google,  
9       have no idea how that happened. And because it was a draft  
10      Texas -- unredacted draft Texas complaint, we never had  
11      access to that, so it had to come from someone that Texas  
12      provided access to.

13                 We immediately raised it with the State, with  
14      counsel, and we asked for their assistance in investigating  
15      it. I won't get into all the back and forth, Your Honor, but  
16      we got some cooperation, but we didn't get entirely the  
17      cooperation that we have expected, and we're still following  
18      up on that.

19                 It's obviously a very important point here, where  
20      we're in a case with government regulators, information is  
21      provided confidentially and voluntarily, it needs to stay  
22      that way and the State acknowledges that. And counsel was  
23      very forthright, and they've even told this Court that that  
24      redacted information is confidential; it should stay  
25      confidential and it shouldn't be disclosed to the media or to

1 others.

2           Obviously, someone chose to violate the protective  
3 order and the confidentiality agreements that were part of  
4 the investigation. And we are very much trying to figure out  
5 what happened so that we can prevent it in the future, so  
6 that we can go forward.

7           So we ask for two things, and we don't -- and we  
8 are going to discuss these, and I hope we can come to  
9 agreement -- to an agreement on this, and it's essentially  
10 this. In the event of a breach, full cooperation and  
11 transparency by either side, wherever the breach was, so that  
12 we can address it, remedy it, and prevent it in the future  
13 more quickly.

14           Second, more disclosure so that such that both  
15 sides have already agreed that whoever gets access to  
16 confidential information has to sign a commitment to the  
17 protective order, essentially saying *I know what the*  
18 *protective order requirements are and I will abide by them,*  
19 *and I am personally obligated to do that* -- both sides have  
20 followed that practice, presumably -- and have those  
21 certificates, certifications, for people that get it.

22           What we are proposing is essentially what the  
23 Western District of Texas template protective order requires,  
24 which is when you give it to an outside consultant, you  
25 provide the name of that consultant to the other side before

1 you provide confidential information.

2 So our thinking, Your Honor, is, one, it's not that  
3 unusual to do that. But, two, if outside consultants and  
4 agents and independent contractors recognize that they --  
5 that both -- all parties know that they're getting  
6 confidential information, it will have a prophylactic effect,  
7 so if anyone's tempted to be -- you know, to potentially  
8 violate the protective order, they won't do it; and second,  
9 as part of that fuller disclosure, whether any of those  
10 third-party agents, independent contractors, consultants  
11 are -- have any ongoing ties to Google competitors or  
12 complainants. The reason why we think that's significant, as  
13 in a patent case, that heightens the risk that there might be  
14 disclosures. We would obviously work with the State on what  
15 that list would be.

16 But those are the two things we're asking about.  
17 We haven't -- in all fairness, we just got that to them.  
18 They're thinking it through, and we will discuss it. And if  
19 we have disagreements, of course, we'll -- that we can't  
20 resolve, we'll bring it to the Court.

21 THE COURT: All right. Thank you, Mr. Yetter.

22 Mr. Lanier?

23 MR. LANIER: Yes, Your Honor. I'll represent to  
24 the Court right now, just so you've got it in your brain,  
25 that we will have a disagreement over disclosing the identity

1 of consulting experts and things that, under the rules, we're  
2 not allowed to disclose -- we're not required to disclose, by  
3 our understanding.

4 We certainly will have no qualm to anyone signing  
5 the confidentiality arrangement, and it will include redress,  
6 and it will include the Court's ability to come down as a  
7 hammer, which is stronger than anything anybody else has got.  
8 We've got no problem with that, and we'll have our consulting  
9 experts sign those things and we'll keep them.

10 The issue we're going to have is disclosing this to  
11 the other side. We've got a situation where the defendant in  
12 this case may have more data than any other entity in the  
13 entire Planet Earth. And so we live in a world where we're  
14 very concerned that nobody uses a Gmail account, nobody uses  
15 anything that goes through all of the Google filters and all  
16 of the Google accounts.

17 And we're trying to build within ourselves a  
18 confidentiality that will meet the needs of the case and will  
19 serve this Court but, by the same token, will not feed the  
20 information giant in a way that allows them to data mine all  
21 of our consulting experts' emails that have -- they've got a  
22 right to it, that's never been a Gmail account, that allows  
23 them to do a lot of things like that.

24 It's a touchy situation because of who the parties  
25 are and where we are. And so we will refine that down and

1 put any disagreements in front of the Court. We're trying to  
2 work cooperatively. We think it's critical to get the  
3 protective order done.

4 And we've tried really hard to figure out where the  
5 leak came from. We don't know. I'll represent that I  
6 personally talked to a number of our people, and we've had  
7 everybody sweep. It's not from us. I can represent that to  
8 the Court, based upon diligent investigation, not obviously  
9 personal knowledge, but I do not believe it's us.

10 And we will ascribe to any kind of hammer the Court  
11 wants. You've got more authority -- I mean, you can shut  
12 down the electricity for this whole region, if you choose. I  
13 don't know how long it would last. But I mean, we know the  
14 authority you've got, and we are quick to say bring the  
15 hammer down if we violate that. But disclosing experts -- or  
16 consultants is something that we're loathe to do absent the  
17 Court telling us we have to.

18 MR. YETTER: Your Honor, just briefly, two points.  
19 The reason we're asking and the reason why we didn't ask in  
20 the Search case is because we've had a disclosure here and it  
21 obviously came from that side. And we have nothing we can do  
22 about it if we don't know who they disclosed their draft  
23 complaint to. And we asked counsel, and they simply said  
24 *we're not telling you.* And they do know. And we have no  
25 way, other than to simply accept what they're saying, which

1       is trust us, it wasn't us. And we can't let this happen  
2 again, and that's why we're trying to get to the bottom of  
3 it. And we think that will have a prophylactic effect.

4              Second, this is not unusual. The Western District,  
5 essentially, in its protective order for everybody to use,  
6 has this very provision. This issue about data mining, I  
7 have no idea where that's come from, that has nothing to do  
8 with this case. I don't know why that would be suggested.

9              But there's been one disclosure. It came,  
10 unfortunately, from the plaintiffs' side. And we need to  
11 have something -- put into place something that will prevent  
12 it in the future, so that we can go forward and know that  
13 information that's confidential, whether it's third party or  
14 internal Google information, will be kept pursuant to the  
15 Court's orders, and the Court's orders will be respected.

16              If the Court doesn't know who breaches it, there's  
17 nothing the Court can do either. So that's kind of our  
18 position. And we won't -- we don't mean to hash this out in  
19 front of the Court, but we will talk with counsel and see if  
20 we can get something worked out.

21              THE COURT: All right. Well, I appreciate the  
22 comments from counsel on both sides. You know, my hope would  
23 be that you can work together and maybe find some sort of  
24 middle ground, and you may not be able to, on this issue.  
25 And if not, you can certainly bring it to the Court's

1 attention and we'll resolve it.

2 You know, the only two points I think it's  
3 worthwhile for me to make at this point are, number one, I do  
4 think the protective order needs to be robust and arguably  
5 quite robust here, given the sensitivity of the information  
6 involved. And as Mr. Yetter's pointed out, I was aware of  
7 that unfortunate leak, and so I think that maybe underscores  
8 the point just how robust the protections will need to be,  
9 number one.

10 The second point I would like to make is just in  
11 terms of timing, and this will probably be obvious to counsel  
12 for both sides as well, which is that ideally we would want  
13 to have something in place before the Court's order governing  
14 proceedings itself is going out, for the obvious reason that  
15 following that order there is a, you know, a period of I  
16 think fairly intense disclosures, you want to call it,  
17 discovery. And so looking at this timeline, I think we want  
18 to try and mark that on the calendar as the time frame that  
19 we're going to need that protective order in place.

20 Anything else on the protective order counsel need  
21 to bring to the Court's attention right now?

22 MR. LANIER: Not from plaintiff.

23 MR. YETTER: No, Your Honor.

24 THE COURT: All right. So the last topic that I  
25 had just has to do with conferencing. And by that I mean, I

1 have already seen some back and forth on certain issues, even  
2 at this early stage of the case, that has to do with  
3 agreements or perceived agreements between parties and who,  
4 you know, who may be bound by them. And that's  
5 understandable in a case particularly where we have ten  
6 states on one side of the V here, and we have Texas acting as  
7 lead -- you know, acting as lead counsel, but we have nine  
8 other, again, sovereign states involved in this.

9 So something that I wanted to hear from both of you  
10 on briefly is just, number one, to help me understand where  
11 you both see that right now. And what I mean by that is my  
12 understanding is as a general matter, the State of Texas is  
13 acting as lead counsel and as a general matter, at least as  
14 to certain items, the State of Texas can speak for other  
15 states. But this is where I'm not sure how far that goes.

16 I would say that for things like any kind of a  
17 major motion, like a 1404(a) motion, I would expect that one  
18 way or the other, with regard to conferencing requirements,  
19 you would need signoff from all, all of the States.

20 Obviously, in a case like this, there's going to be  
21 a whole series of issues -- we've talked about some of them  
22 today, things like protective orders and discovery issues --  
23 that you all will be working together. And so I want to have  
24 a better understanding right now from both the States'  
25 perspective, and then we can have comments from Google, on

1 how that's been working and/or not working.

2 MR. LANIER: All right, Your Honor. Speaking, Mark  
3 Lanier, on behalf of the plaintiff, plaintiff State of Texas,  
4 I've been in communication with several attorneys general of  
5 several of the other States that have joined. We're trying  
6 to work through whether or not there is a direct  
7 representation we might be able to get them as the legal team  
8 in this case, or whether or not they're going to exist on  
9 their own within the litigation. Obviously, to the extent we  
10 represent them as counsel, we will do the necessary work  
11 before anything we file, to make sure all of our clients are  
12 apprised and signing off on it, and we'll be able to  
13 represent them fully under a power of attorney.

14 For those states that choose to go it alone, the  
15 best resource that we've got is the responsibility under the  
16 rules to conference and urge them not to swim against the  
17 tide, not to buck what's going down, but to join in efforts  
18 to minimize the inefficiency to Your Honor. You're not going  
19 to want 12 briefs that say the same thing where you've got to  
20 winnow through them to figure out if there are discerning  
21 argument on footnote 3 of page 19 of XYZ State.

22 So it is our pledge to you that we will work hard  
23 to integrate those filings so that you only see one filing  
24 for plaintiff. If there's something unusual, if -- then  
25 we'll try to do it in a way that highlights what's unusual,

1 so if you get a multiplicative filing, you know what's what.

2 THE COURT: That's helpful, Mr. Lanier. Before I  
3 hear from Mr. Yetter, I think that, you know, because this  
4 obviously is an issue mostly on the plaintiffs' side, I do  
5 think it will be helpful for lead counsel for Texas to work  
6 with the other states and develop the best solutions that  
7 there are for how this is going to proceed. And to the  
8 extent that there are states that want to simply proceed as  
9 independent plaintiffs and have their own counsel speaking,  
10 then, you know, the Court can work with that. But for the  
11 purposes of agreements, and particularly I know for, I'm  
12 sure, for the defendant, whatever you can do to make it quite  
13 clear, you know, when Texas -- when and how the State of  
14 Texas speaks for the other states and when and how it  
15 doesn't.

16 MR. LANIER: Excellent, Your Honor. And I'll  
17 pledge myself, as lead counsel, to doing that personally and  
18 making sure the defendants, when they check with us, don't  
19 have the necessary obligation to check with every state.  
20 We'll try to do that background work to make sure that  
21 everything is conferenced properly for the Court.

22 THE COURT: Right. And I understand the  
23 difficulties. I have some experience with that.

24 Mr. Yetter, do you have --

25 MR. YETTER: Yes, just --

1                   THE COURT: -- comments from Google?

2                   MR. YETTER: Just briefly. You know, Your Honor  
3 touched on something that counsel and I have talked about.  
4 And from our perspective, it is -- it's both time consuming  
5 and frustrating not to know who we're talking to. And our  
6 communications so far have been -- obviously, very excellent  
7 counsel on the other side -- have been cordial, and we have  
8 had our disagreements, but we have been making good progress.

9                   Where we find that we're not talking to the whole  
10 group is when we have a disagreement about something, and  
11 then we hear that, well, you haven't even talked to the other  
12 states yet; and on other things, the Texas counsel is  
13 speaking for them all.

14                  One thought I had, and we will work with the  
15 States, and we hope that they can coalesce and have a single  
16 voice that otherwise it's going to even further delay the  
17 case and make it more cumbersome. But one thought I had, and  
18 I will raise it with the other side, is maybe we come up with  
19 some email that includes all of the other States' lawyers  
20 that want to be included and in our communications, we just  
21 make sure they get copied. And unless anybody says something  
22 different from the other States, we're just going to assume  
23 that everybody's okay with the agreements that we reach with  
24 the State of Texas.

25                  Now, that may not be workable. But what we're

1 looking for is something efficient so that we can deal with  
2 the ten states in a professional, efficient, expedited way,  
3 without having later disagreements, well, you didn't ask me  
4 specifically, or that, and which we would like to avoid. So  
5 we'll do whatever the States think best, but we would love  
6 for them to have a single voice in most -- most or all  
7 discussions with us.

8 THE COURT: All right. Mr. Lanier?

9 MR. LANIER: Please, Your Honor. I don't have  
10 experience in front of you, and Mr. Yetter and I have known  
11 each other professionally some, but not a lot of experience.  
12 I'm not one who is going to fight this kind of stuff in the  
13 sense of being obstreperous or using a State to leverage or  
14 something like that.

15 I'll represent to you that in my mind what you've  
16 done by saying lead counsel for Texas is responsible to ABC,  
17 as you've said earlier, is akin to a liaison counsel role in  
18 an MDL or something, where you basically said, Lanier, you  
19 better get all of those people in line and you better make it  
20 clear if there is an issue, because Yetter ought to be able  
21 to deal with you and let you take it from there. And I'll  
22 pledge to the Court to do that because I think it will be  
23 expedient, I think it will be fast. I'll work with  
24 Mr. Yetter to figure out the formula of where I'm allowed to  
25 speak for others and where I'm not, and we'll make it real

1 clear where you never have to get involved at all.

2 MR. YETTER: Your Honor, that sounds like a good  
3 plan.

4 THE COURT: All right. I appreciate the comments  
5 from both counsel. And as I mentioned before, I understand  
6 that this is, you know, it just can be difficult when you  
7 have a number of states and it's -- you know, ten states is  
8 not a particularly small number. I'm not going to give you  
9 detail thoughts on this because I think you're already on top  
10 of it, but I think the development of protocols -- this is  
11 simply with regard to, you know, where you're going to need  
12 to reach agreements, so protocols that both sides can  
13 understand about -- here's how you know we have signoff from  
14 all of the plaintiffs, this is the way you're going to know  
15 every plaintiff has signed off on this.

16 Of course, this is short of -- as you mentioned,  
17 Mr. Lanier, there is the situation where you have otherwise  
18 it is clear that some or all of the States have just been  
19 able to turn this over to allow Texas to, basically, you  
20 know, represent them, in effect, as lead -- you know, lead  
21 counsel type of role. But short of that, and I understand it  
22 may not be possible, I do think it's going to be important to  
23 have those kinds of protocols so that the defendant knows,  
24 unequivocally knows, when they're agreeing with just Texas or  
25 Texas and five States, and when they're agreeing with all

1 States.

2 And I'm going to be sympathetic to the concerns the  
3 defendant has where there is a lack of clarity, because as  
4 hard as it may be on the plaintiffs' side -- and I recognize  
5 it may not be easy to bring all the States together -- I do  
6 think it's going to just be on the States and probably, as  
7 I've mentioned, mostly Texas as lead State, to try to make  
8 sure that happens.

9 MR. LANIER: Yes, sir.

10 THE COURT: All right. That was the issue of  
11 conferencing was really the last topic that I wanted to cover  
12 today in terms of this preliminary conference. And so I will  
13 open it up for counsel if there's any other issues that you  
14 think we need to discuss at this conference.

15 Mr. Lanier.

16 MR. LANIER: None for plaintiff, Your Honor.

17 MR. YETTER: None for the defendant, Your Honor.

18 THE COURT: All right. Well, I want to thank you,  
19 counsel. Your comments and thoughts have been very helpful,  
20 and I've appreciated getting a chance to visit with you as we  
21 get this case moving.

22 We will stand in recess. Thank you.

23 (Adjourned at 10:54 a.m.)

\* \* \* \*

1 CERTIFICATE OF OFFICIAL REPORTER  
2  
3

4 I, Gayle Wear, Federal Official Court Reporter, in  
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13 Dated 8th day of February 2021.

14

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16 /s/ Gayle Wear  
17 GAYLE WEAR, RPR, CRR  
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